DHS Proposes Significant Changes to Employment-Based Immigration System

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Recently, the U.S. Department of Homeland Security (DHS) released a notice of proposed rulemaking (NPRM) that has received significant attention. Over fifteen years ago, two major laws were enacted that dramatically changed the employment-based immigration system: the American Competitiveness in the Twenty First Century Act of 2000 (AC21) and the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA). However, many of the main features of these laws were defined by DHS policy memoranda and not implemented through the formal rulemaking process. The December 30, 2015 NPRM not only intends to finally bring the regulations in line with current DHS policy, but also proposes new changes affecting both the nonimmigrant (temporary) and immigrant visa (permanent) processes. This update will focus on the latter.

1. Immigrant Petition (I-140) Revocations

A fundamental part of the employment-based permanent residence process is the I-140 immigrant petition. This petition is filed by the sponsoring employer and, upon approval, establishes the employment-based classification and the priority date, both of which impact the amount of time, if any, a foreign national may need to wait before taking the final step in the process. In light of the severe waits many foreign nationals must endure, the above-mentioned statutes grant the beneficiary of an approved I-140 many benefits. In general, the NPRM seeks to protect these benefits.

Under the NPRM, if an I-140 is withdrawn by the petitioner or petitioner's business terminates, DHS will not revoke the I-140 if it has been approved for 180+ days. As the NPRM indicates, DHS is making the change to prevent the I-140 withdrawal by a foreign national's prior employer from undermining the H-1B extension and I-140 portability provisions of AC21. If implemented, it would allow

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new employers to secure H-1B extensions on behalf of employees beyond the traditional six-year H-1B limit without fear that the basis for such extensions (the I-140) could unexpectedly vanish. DHS still retains the authority to revoke I-140 petitions obtained through fraud, material misrepresentation, invalidation or revocation of underlying labor certification, or DHS error.

2. H-1B Extensions Beyond Six-Year Limit

The NPRM proposes to limit access to extensions under section 106(a) of AC21. Currently, DHS permits a foreign national to receive one-year extensions of H-1B status beyond the typical six-year limit as long as either a PERM labor certification or immigrant visa petition (e.g., I-140 petition) has been pending or approved for at least 365 days. The NPRM proposes to limit the indefinite nature of such extensions by requiring a foreign national to file an application for adjustment of status or submit an immigrant visa application within 1 year of an immigrant visa becoming immediately available in order to receive additional H-1B extensions. DHS would have discretion to excuse failure to file within the 1-year window due to circumstances beyond the foreign national's control.

Depending on how this requirement is applied, it could negatively affect an employer that is extending the H-1B status of an employee beyond the traditional six-year limit based on a prior employer's I-140 petition and has not yet started or completed its own efforts to secure a new I-140 on behalf of the employee. If the priority date secured by the prior employer's I-140 petition becomes current, the one-year clock to file for permanent residence may start. If it does and the employer does not have a new I-140 petition in place to allow the employee to apply for permanent residence through its sponsorship, it could limit its ability to further extend the employee's H-1B status.

3. Priority Date Retention

DHS proposes that the priority date will permanently attach to the foreign national immediately upon approval of an I-140 petition unless it is later revoked due to fraud, willful misrepresentation, erroneous approval, or revocation or invalidation of the underlying

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PERM labor certification.

Under the current regulations, a foreign national's priority date will disappear if the I-140 is revoked for any reason (e.g., the petitioner withdrawals), an approached followed by the Board of Immigration Appeals in one recent, non-binding decision. However, DHS has been known to permit the continued validity date of a priority date even if the I-140 has been revoked as long as it was not revoked due to fraud or willful misrepresentation. While this practice may appear inconsistent with the regulations, it is consistent with the DHS' Adjudicator's Field Manual (AFM) as well as the Department of State's Foreign Affairs Manual (FAM). To clear up the uncertainty in this area, the NPRM seeks to bring the regulations in line with the AFM and FAM.

4. 60-Day Grace Period

Currently, when a foreign national in H-1B, H-1B1, E-1, E-2, E-3, L-1, and TN ceases employment, whether voluntarily or involuntarily, he/she is out of status and must, in general, promptly leave the U.S. To provide foreign nationals with more flexibility, the proposed rule would give foreign nationals in the above-mentioned classifications a grace period to find new employment or figure out their next step. The grace period would either be 60 days or until the existing validity period ends, whichever is shorter.

This change would bring more certainty to the H-1B "change of employer" process. Currently, if a foreign national is laid off and out of status but finds a new employer, the new employer may file an H-1B petition and request DHS to exercise discretion and approve the petition without requiring the foreign nation to leave. The proposed rule would remove the uncertainty of such cases that hinge on DHS' exercise of favorable discretion.

5. 10-Day Grace Periods

DHS proposes to extend the 10-day grace period currently granted at the beginning and end of an H-1B or H-1B1 visa holder's period of authorized stay to foreign nationals in E-1, E-2, E-3, L-1, and TN status. While the foreign national would not be able to work during

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the grace period, it would permit him/her to enter the U.S. before their start date to settle down or, at the end of their stay, settle their affairs prior to departure or find new employment.

6. I-140 Job Portability

In addition to codifying DHS' current practice concerning I-140 portability, the NPRM mentions that DHS may create a supplementary form to formalize the process. Currently, foreign nationals may but are under no obligation to inform DHS that they are "porting" their pending I-485 to a new employer.

7. Adjudication of employment authorization documents (EADs)

If an EAD extension is timely filed before the current EAD expires, DHS would automatically extend the validity of the expiring EAD by 180 days. This change would benefit foreign nationals that are no longer maintaining nonimmigrant status and, instead, working pursuant to an EAD connected to a pending I-485. As EADs expire every two years and an extension may currently take up to 90 days, the proposed rule would reduce the risk of a gap in employment authorization. It is important to note that the proposed rule would not extend the benefit of automatic EAD extensions to H-4 dependents.

However, at the same time DHS would add the benefit of automatic EAD extensions, it would take away the 90-day processing timeframe and the availability of interim EADs for applications not processed within this timeframe.

8. Issuance of EADs Due to "Compelling Circumstances"

If a foreign national is (1) in E-3, H-1B, H-1B1, O-1, or L-1 status, (2) the beneficiary of an approved I-140 petition, (3) unable to submit an I-485 application due to the visa backlogs, (4) and facing "compelling circumstances", he/she may apply for an EAD valid for 1 year. While DHS is not proposing a definition of "compelling circumstances", it

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does indicate situations involving serious illness and disabilities, employer retaliation, substantial harm to applicant, or significant disruptions to the employer may qualify.

Employers interested in commenting on the proposed rules may submit their written comments on or before February 29, 2016. To date, nearly 14,000 public comments have been submitted.

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